ST 01-0221-GIL 10/24/2001 INTERSTATE COMMERCE

The U.S. Supreme Court in its analysis of the Commerce Clause has concluded that the Constitution confers no immunity from State taxation on interstate commerce and that interstate commerce must bear its fair share of the state tax burden, so long as certain minimum contacts occur. See Complete Auto Transit v. Brady (1977), 430 U.S. 274. (This is a GIL).

October 24, 2001

Dear Xxxxx:

This letter is in response to your letter dated June 29, 2001 that we received on July 17, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at the Department's Website at http://www.revenue.state.il.us/legalinformation/regs/part1200.

In your letter, you have stated and made inquiry as follows:

> Please find enclosed a letter from AAA out of CITY/STATE. This Company sends solicitors within the City and our Solicitation Ordinance provides that all solicitors shall have a sales tax number from the Illinois Department of Revenue. This Company refuses to produce a sales tax number and cites the enclosed case for its position that it need not pay sales taxes to any state or municipality.
>
> The CITY does not have the resources to challenge this assertion but we want to make you aware of the position of this Company. Please advise whether this Company is right in its assertions and, if not, whether the Illinois Department of Revenue will pursue an appropriate action.

Thank you for bringing this matter to our attention. We are referring the AAA to the Department's Compliance Program. AAA's reliance on the very old cases listed in the attachment, including Real Silk Hosiery Mills v. Portland, 268 U.S. 325, is misplaced. Those cases dealt with situations where local governments had imposed license, fee or other requirements upon traveling salesmen of magazines or other tangible personal property. The issue in those cases was whether the local ordinance discriminated against out-of-State businesses by imposing an obligation on them that was not imposed upon resident businesses.

For purposes of sales or use tax liability, the analysis in those old "peddler" cases has been superceded by the U.S. Supreme Court's modern Commerce Clause analysis, that the supreme court first set forth in Complete Auto Transit v. Brady (1977), 430 U.S. 274. The important thing here is that the U.S. Supreme Court in its recent analysis of the Commerce Clause has concluded that the Constitution confers no immunity from State taxation on interstate commerce and that interstate

commerce must bear its fair share of the state tax burden, assuming the existence of nexus between the taxing jurisdiction and the business or activity being taxed.

Section 3-45 of the Illinois Use Tax Act imposes a use tax collection responsibility upon retailers "maintaining a place of business in this State" 35 ILCS 105/3-45. The Act defines a "Retailer maintaining a place of business in this State" to include any retailer:

> "Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State" 35 ILCS 105/2

The Department's administration of this and other provisions of the Illinois Use Tax Act is subject to the interpretive guidance of the courts, including the U.S. Supreme Court ruling of Quill v. North Dakota, 112 S. Ct. 1902 (1992), in which the supreme court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. Quill invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not require an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, even if temporary, will trigger Use Tax collection responsibilities.

The U.S. Supreme Court in other cases has discussed the concept of substantial nexus. As noted above, it is important to remember that the U.S. Supreme Court has concluded that the Constitution confers no immunity from State taxation on interstate commerce and that interstate commerce must bear its fair share of the state tax burden, assuming, of course, the existence of nexus between the business and the jurisdiction imposing the tax. Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 444 (1979); Goldberg v. Sweet, 488 U.S. 252 (1989).

As long as the conditions of the four-part test established by the U.S. Supreme Court in Complete Auto Transit v. Brady (1977), 430 U.S. 274, 279, are fulfilled, no impermissible burden on interstate commerce will exist. These four parts are whether the tax:

(1) is applied to an activity with a *substantial nexus* to the taxing state;

(2) is fairly apportioned;

(3) does not discriminate against interstate commerce; and

(4) is fairly related to the services provided by the State.

As a general proposition, companies who send traveling salespersons into Illinois to sell their product are maintaining a physical presence in Illinois that satisfies the substantial nexus requirement. AAA cannot complain that the Illinois Use Tax collection responsibility is discriminatory as applied to out-of-State companies that maintain a physical presence in Illinois, because it applies to all Illinois retail sellers, 35 ILCS 105/3-45.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk